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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 872

CLAUDE R. KIRK, JR., as Governor the the State of Florida, et al.,

Appellants,

v.

EDMOND J. GONG, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

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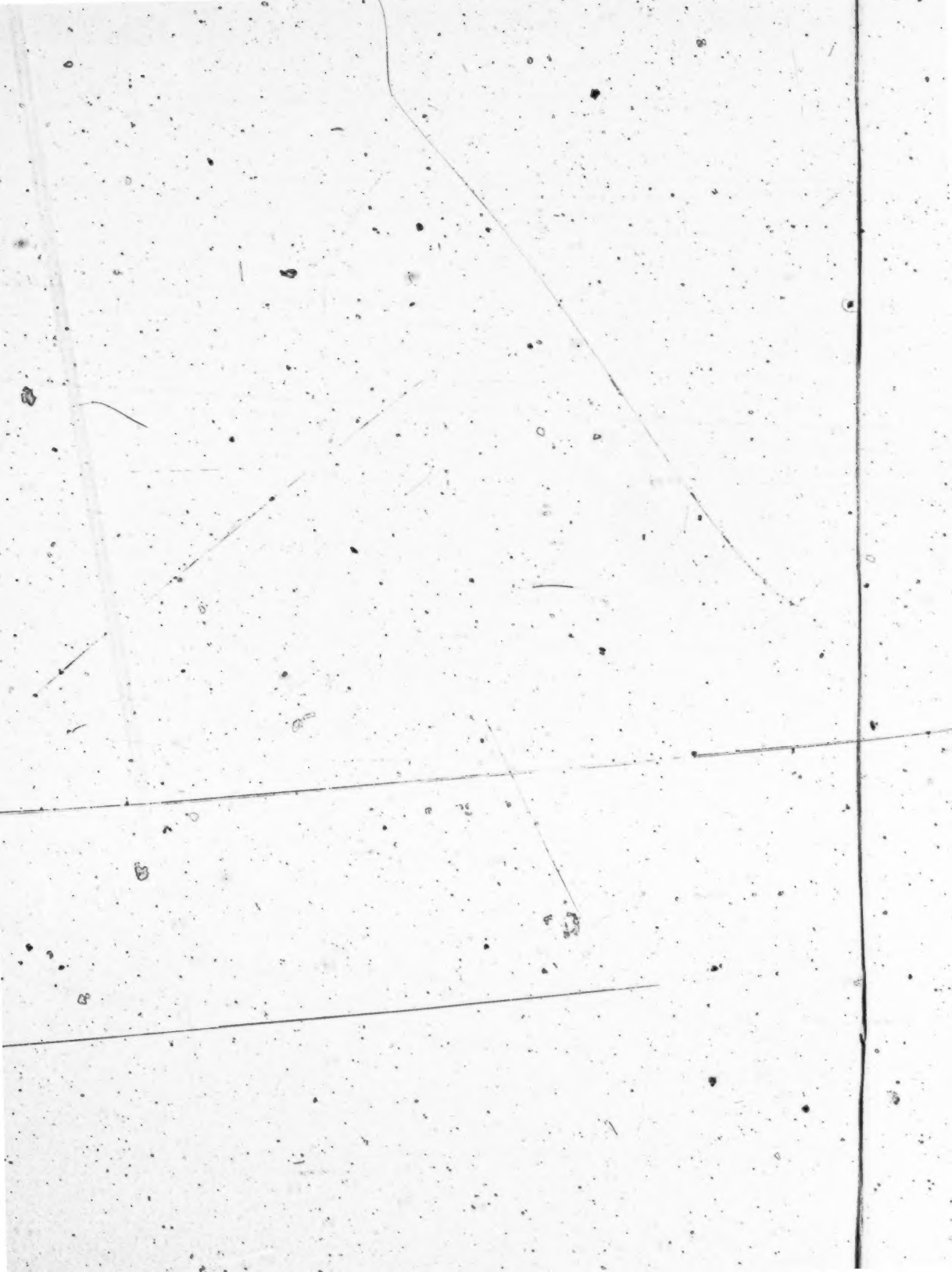

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IN THE
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No._____

CLAUDE R. KIRK, JR., as Governor of the State of Florida, et al.,

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EDMOND J. GONG, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

This is an appeal by Claude R. Kirk, Jr., as Governor of the State of Florida, Tom Adams, as Secretary of State of the State of Florida, Earl Faircloth, as Attorney General of the State of Florida, and Fred O. Dickinson, Jr., as Comptroller of the State of Florida, as some of the defendants below, from an opinion and order of the United States District Court for the Southern District of Florida, entered on August 2, 1967, and a subsequent order dated September 27, 1967, finding a legislative enactment (Chapter 65-2441, Laws of Florida

1965) which divided the state of Florida into twelve Congressional districts as being unconstitutional in violation of Article I, section 2, of the Constitution of the United States, and the equal protection clause of the Fourteenth Amendment under the rule in *Duddleston v. Grills*, 385 *U.S.* 455(1967) vacating, *Grills v. Branigan*, 255 F. Supp. 155 (S.D. Ind. 1966); *Swann v. Adams*, 385 U.S. 440 (1967); *Reynolds v. Sims*, 377 U.S. 533 (1964). The opinion and order of August 2, 1967, also enjoined the defendants from enforcing Florida Statute section 8.01 (1965); and redistricted the twelve Congressional districts by judicial decree using a factored population which was established by a calculation of the population of each relevant voting precinct by determining the ratio, based on the most recent voter registration figures, of the registered voters in each voting precinct to the total registered voters of the particular county and applying that ratio to the county population as shown by the 1960 decennial census. The court-ordered redistricting plan using the factored population formula demonstrated a total maximum deviation of 1.94 per cent between the smallest and largest Congressional districts.

Subsequent to the entry of the lower court's opinion and order dated August 2, 1967, these appellants were given a report from the United States Department of Commerce, Bureau of the Census, dated September 6, 1967, which demonstrated that by applying the 1960 decennial census population through census enumeration districts to the court-ordered Congressional districts there is a total maximum deviation of 11.83 per cent between the smallest and largest Congressional districts. This fact was brought to the lower court's attention by these appellants in the Suggestion for Reconsideration of Judgment and Final Order and Motion to Stay Proceedings on September 20, 1967, but the lower court refused to consider this

matter and by its order dated September 27, 1967, reaffirmed its order of August 2, 1967.

This statement is submitted to show that the Supreme Court has jurisdiction of this appeal and that the District Court erred in using factored population figures in lieu of the last Federal decennial census in redistricting the Congressional districts of Florida and that important and substantial questions requiring immediate action by this Court are presented.

OPINIONS BELOW

The orders appealed from are reported at *Gong v. Kirk*, ... F. Supp. ..... (S.D. Fla. 1967), and *Gong v. Kirk*, ... F. Supp. ..... (S.D. Fla. 1967). Earlier opinions in this case are reported as *Gong v. Kirk*, 375 F. 2d 728 (5th Cir. 1967), and an unreported order of the lower court dated March 1, 1966. Copies of the orders of the court below are printed herein as Appendices A-1 and A-2. A copy of the order of the U. S. Court of Appeals for the Fifth Circuit is printed herein as Appendix A-3. A copy of the unreported order of the lower court dated March 1, 1966 is printed herein as Appendix A-4.

JURISDICTION

This suit was filed by the appellees, plaintiffs below, in March, 1964, pursuant to Title 42, U.S.C., sections 1983 and 1988, Title 28, U.S.C., sections 1443 (3), 2201 and 2281. The lower court by its order dated March 11, 1964, denied plaintiffs' Motion for Preliminary Injunction without prejudice and deferred decision on the plaintiffs' Motion for Judgment on

the Pleadings until after the 1965 session of the Florida legislature. In August, 1965, the plaintiffs below again petitioned the lower court to review a new Congressional redistricting plan (Chapter 65-2441, Laws of Florida, Extra Session 1965). The lower court by its order dated March 1, 1966, decreed Chapter 65-2441 to be constitutionally valid on a temporary basis. An appeal was taken to the U. S. Court of Appeals for the Fifth Circuit and that court by its order dated March 17, 1967, held that the lower court erred in not convening a three-judge court and it therefore lacked jurisdiction over this matter. The plaintiffs below again petitioned the lower court to convene a three-judge court to consider the issues. A three-judge court was duly convened and this is an appeal from the orders of that District Court dated August 2, 1967 and September 27, 1967. Notice of appeal was filed by the appellants herein on October 2, 1967. The jurisdiction of the Supreme Court to review the orders of the District Court is conferred by Title 28, U.S.C., section 1253. The following decisions sustained the jurisdiction of the Supreme Court to review on direct appeal the judgments in this case: *Duddleston v. Grills*, 385 U.S. 455 (1967); *Swann v. Adams*, 385 U.S. 440 (1967); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

STATUTES INVOLVED

Directly involved are the provisions of Chapter 65-2441, Laws of Florida, Extra Session 1965 (SB 26-XX), which is printed herein as Appendix B-1. Although the appellants do not seek to urge the constitutionality of Chapter 65-2441, supra, it was the vehicle by which the plaintiffs below instituted these proceedings which resulted in the court-ordered Congressional redistricting now on appeal.

QUESTIONS PRESENTED

Does the use by the United States District Court of factored population figures in the Congressional redistricting of the state of Florida in lieu of the last Federal decennial census meet the minimal requirements of the equal protection clause of the United States Constitution where the factored population figures utilized by the court below show a maximum deviation of 1.94 per cent but the latest Federal decennial census shows a total maximum deviation of 11.83 per cent?

STATEMENT OF THE CASE

This proceeding was originally filed by the appellees in March, 1964, attacking the provisions of Chapter 61-302, Laws of Florida 1961, which amended section 8.01, Florida Statutes, to provide for twelve Congressional districts in the state of Florida. The petition at that time demonstrated that in one instance a Congressional district exceeded the average population of 412,630 by 60.03 per cent and another Congressional district was below the average of 412,630 by 42.50 per cent. The plaintiffs below also filed a Motion for Preliminary Injunction and a Motion for Judgment on the Pleadings. Subsequent to this the defendants all filed their answers to the petition substantially admitting all of the factual matters contained therein. The lower court, in the form of one United States District Judge, by its order dated May 11, 1964, denied the plaintiffs' Motion for Preliminary Injunction without prejudice and deferred decision on the plaintiffs' Motion for Judgment on the Pleadings until sixty days after the 1965 session of the Florida legislature.

Subsequent to the foregoing proceedings, the Florida legislature in special session enacted Chapter 65-2441, Laws of Florida, Extra Session 1965 (SB 26-XX) and the plaintiffs again petitioned the lower court to review the foregoing Congressional redistricting plan in the light of constitutional requirements. This new petition demonstrated that Chapter 65-2441, Laws of Florida, provided for a total maximum deviation of 21.94 per cent between the highest and the lowest Congressional districts. The lower court, again in the form of one United States District Judge, by its order dated March 1, 1966, decreed that Chapter 65-2441, Laws of Florida, Extra Session 1965, met the constitutional standard of *Wesberry v. Sanders*, supra, on a temporary basis and retained jurisdiction of the case until sixty days after the 1967 session of the legislature.

An appeal was taken from the order of March 1, 1966, to the U. S. Court of Appeals for the Fifth Circuit by the plaintiffs below and the U. S. Court of Appeals by its order dated March 27, 1967, held that the lower court erred in not convening a three-judge court and it (the lower court) was therefore without jurisdiction to entertain the petition of the plaintiffs below.

Pursuant to the mandate of the U. S. Court of Appeals, the plaintiffs below again petitioned the U. S. District Court for the Southern District of Florida to convene a three-judge court, declare that section 8.01, Florida Statutes 1965, violates the United States constitution, enjoin the defendants from holding any further elections under such statute on the ground that it is unconstitutional and grant other coercive relief as the court may deem appropriate. Pursuant to this petition, a three-judge court was convened and the court by its Order for Pre-trial Conference dated May 29, 1967, requested a state-

ment from all the parties in response to certain questions which included, inter alia, what the parties proposed as a fair and constitutional redistricting and what census or censuses or other calculations of Florida population could or would be a reliable basis for the court to consider in respect to redistricting.

In response to the District Court's queries, the plaintiffs and the defendants below filed what they considered to be, at that time, calculations of Florida population which the plaintiffs and the defendants thought would be a reliable basis for the court to consider in respect to redistricting. The plaintiffs and defendants below used a factored population which provided that in any county where a county line is crossed and it becomes necessary to consider the population in precincts, a factor had been applied to the registered voters in each precinct which is demonstrated by the following:

$$\text{(1960)}\quad \frac{\text{Total County Registration}}{\text{County Population}} = \frac{\text{Precinct Registration}}{\text{Precinct Population}}$$

Thus, by the utilization of the above formula, multipliers were used in the following applicable counties by these appellants: Duval, Dade, Broward, Polk, Brevard. Since the appellees used a slightly different scheme in their approach to Congressional redistricting and crossed county lines in other areas, they used multipliers for certain other counties in their approach to a Congressional redistricting plan. Both the appellants and appellees, however, used the same basic formula in their approach to factoring the counties in which a county line was crossed.

In further response to the court's questions in the pre-trial order dated May 29, 1967, both the appellants and the ap-

pellees concurred in stating that the census or censuses of Florida population that would be a reliable basis for the court to consider in respect to redistricting would be the use of only the 1960 Federal census.

Subsequent to this, the lower court by its order dated August 2, 1967, adopted, with slight modification, HB 3088, which was being considered by the 1967 session of the Florida legislature but which was not ultimately passed by the legislature before its adjournment. The court-ordered redistricting plan, based largely on HB 3088, and using the factored population formula, redistricted the Congressional districts of Florida into twelve districts with a total maximum deviation of 1.94 per cent between the smallest and the largest Congressional districts.

Subsequent to the entry of the court's opinion and order of August 2, 1967, the appellants herein were made aware of the fact that when the census enumeration districts from the 1960 census were applied to the areas where county lines are crossed and where the factored population formula was applied to the precincts within such counties, there resulted a total maximum deviation of 11.83 per cent between the smallest and largest Congressional districts. A comparison of the differences is as follows:

District	Court	Court deviation from equality	Census	Census deviation from equality
1	415,496	+ .69	415,496	+ .69
2	407,677	— 1.20	407,677	— 1.20
3	411,683	— .23	418,595	+ 1.44
4	409,716	— .71	406,367	— 1.52
5	409,532	— .75	405,969	— 1.62
6	415,704	+ .74	416,579	+ .95
7	414,474	+ .44	413,597	+ .23

8	411,450	— .29	411,450	— .29
9	409,952	— .64	401,251	— 2.76
10	414,998	+ .57	405,633	— 1.70
11	414,759	+ .51	448,885	+ 8.78
12	414,691	+ .49	400,061	— 3.05
Smallest	—1.20% (2nd Dist.)		Smallest	—3.05% (12th Dist.)
Largest	.74% (6th Dist.)		Largest	8.78% (11th Dist.)
Total maximum deviation 1.94%			Total maximum deviation 11.83%	

This matter was brought to the lower court's attention pursuant to the provisions of Federal Rules of Civil Procedure, Rule 60 (b), 28 U.S.C., by the appellants' Suggestion for Reconsideration of Judgment and Final Order and Motion to Stay Proceedings.

On September 27, 1967, the lower court reaffirmed the judgment and final order of August 2, 1967, and denied the appellants' Motion to Stay Proceedings.

It is from the judgment and final order of August 2, 1967, and subsequent order of September 27, 1967, that the appellants herein have entered this appeal.

THE QUESTIONS ARE SUBSTANTIAL

The refusal of the lower court to reconsider its order of August 2, 1967, which utilized factored population figures in the Congressional redistricting of Florida in lieu of the last Federal decennial census was in error and repudiates the principle of Reynolds v. Sims, Klahr v. Goddard and Maryland Citizens Committee v. Tawes.

To preface the argument on this statement, your appellants readily admit that they urged the use of factored population on

the court below without realizing the ultimate mathematical impact on the 1960 decennial population census in any Congressional district where a county line is crossed. The urging of the use of a factored population ratio on the court by the appellants was an honest effort, however, to assist the court in arriving at a fair Congressional redistricting plan. Your appellants also submit that this undoubtedly was the motive of the appellees in urging the factored population formula to the lower court.

The thrust of the appellants' argument is, however, that after having discovered the ultimate mathematical result of using factored population figures in the Congressional redistricting scheme, the lower court refused to consider the appellants' Suggestion for Reconsideration of Judgment and Final Order and Motion to Stay Proceedings filed on September 20, 1967. The foregoing motion, together with the exhibits, clearly demonstrated that when the census enumeration districts from the 1960 census were applied to the areas where county lines were crossed and where the factored population formula was applied to precincts within such counties, there resulted a total maximum deviation of 11.83 per cent between the smallest and largest Congressional districts.

Appellants urge that the refusal by the lower court to consider their motion for Reconsideration of Judgment and Final Order and Motion to Stay Proceedings resulted in an error of the lower court and repudiated the principles of *Reynolds v. Sims*, 377 U.S. 533 (1964), *Klahr v. Goddard*, 250 F. Supp. 537 (1966) and *Maryland Citizens Committee for Fair Congressional Redistricting v. Tawes*, 253 F. Supp. 731 (1966).

In delineating what population figures should be utilized in *Reynolds v. Sims*, supra, the court stated, at page 583:

". . . Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect."

With regard to the use of population figures as prescribed y the constitution of the state of Florida, Section 5, Article II, of the constitution of the state of Florida provides as fol-ows:

"The Legislature shall no longer be required to provide for an enumeration of the inhabitants of the State. The last preceding decennial Federal census beginning with the Federal census of 1950 shall also be the State census and shall control in all population Acts and constitutional apportionments, unless otherwise ordered by the Legislature."

Considering the provision of the above cited section of the Florida constitution, the court in *Reynolds v. Sims*, supra, also stated, at page 584:

> "We agree with the view of the District Court that state constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible. But it is also quite clear that a state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements. When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."

With regard to the question as to whether raw population statistics or voting population statistics are governing in Congressional redistricting cases, the court in *Calkins v. Hare*, 228 F. Supp. 824, at page 826, made the following observation:

> ". . . We take Wesberry as our precedent. It is apparent from the majority opinion that this issue had consideration in the Supreme Court in Wesberry, since Justice Harlan's dissenting opinion (n. 4) raises this precise question—'Is the number of voters or the number of inhabitants controlling?' The answer, in our judgment, is found again and again in the Wesberry opinion, from the opening paragraph, referring to the 1960 census by districts and averages and referring to 'this inequality of population', to

the closing paragraph which speaks of 'equal representation for equal numbers of people.' We find no inconsistency in the opinion."

Other courts, who were apparently more farsighted than the appellants concerning the question as to what census or censuses should be used, foresaw the dangers of using factored population in an effort to arrive at a proper population consideration in Congressional redistricting. In *Klahr v. Goddard*, 250 F. Supp. 537 (1966), the court, speaking on what population figures should be used in reapportionment matters, stated the following, at page 540:

"The court finds that in making the several reapportionments herein provided for, it can do so most accurately by basing its findings upon the figures appearing in the 1960 census. For the purpose of supporting his contention that the reapportionment should be based upon 1964 populations, plaintiff has through his witnesses undertaken to project an estimated 1964 population by calculating the ratio of registered voters to population in various counties in census years and *then applying that ratio to the* registration of voters for the 1964 elections. The court finds that the calculations thus produced by the plaintiff have not been established with sufficient certainty and accuracy to warrant their use by the court to determine an appropriate reapportionment of congressional districts and state legislative districts in this decree. Recent census figures secured by actual count in the City of Phoenix, in Pinal County and in Yuma County, depart so far from plaintiff's estimates and calculations of 1964 population in those areas that the court feels justified in rejecting the calculated 1964 population figures as a basis for reapportionment in this case."

The foregoing principle was again followed in *Maryland Citizens Committee for Fair Congressional Redistricting v. Tawes*, supra, at page 734, as follows:

> A difficulty encountered by anyone who undertakes in 1966 to draw district lines with a view to achieving substantial population equality, is that the only accurate figures available are those from the 1960 census. The dilemma presents two possible choices: to accept the 1960 census figures which are not up to date, or to attempt to make estimates of changes in population figures since that date. Neither choice is a happy one, but we have concluded that it is better to adhere to the census figures than to engage in speculative estimates or projections which vary widely with the estimators and the manner in which they handle the figures available to them from various sources. The alternative we have rejected would indeed lead into a mathematical thicket. See Klahr v. Goddard, 250 F. Supp. 537 (D. Ariz. 1966)."

The foregoing opinion was affirmed, *sub nom Alton v. Tawes*, 384 U.S. 315 (1966).

Your appellants urge that in their effort to use a factored population they actually altered the 1960 Federal decennial census figures by attempting to distribute the county population of 1960 on an equitable basis throughout the voting precincts in the Congressional districts and thereby came into conflict with the census enumeration districts of 1960, which resulted in the disparity between the actual census figures demonstrated in appellants' Suggestion for Reconsideration of Judgment and Final Order and Motion to Stay Proceedings filed in the lower court and the lower court's order of August 2, 1967.

Appellants submit, however, that the lower court erred in not reconsidering its order of August 2, 1967, when it is clearly demonstrated that the lower Court's Congressional redistricting plan, utilizing factored population as a basis for the redistricting in the areas where county lines are crossed, does not conform with the census enumeration districts of the 1960 decennial census, and said plan actually has a total maximum deviation of 11.93 per cent.

CONCLUSION

For the reasons stated, this court has jurisdiction of this action and should reverse the orders below and order the District Court to cause redistricting of the Congressional districts of the state of Florida in a manner consistent with the constitution of the United States.

Respectfully submitted,

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APPENDICES

APPENDIX A-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 64-143-CIV-EC

EDMUND J. GONG, ET AL.,
Plaintiffs,

vs.

CLAUDE R. KIRK, as Governor of the State of Florida, ET AL.,
Defendants.

FINAL ORDER

In accord[illegible] with the opinion of the court, it is hereby ordered, ad[illegible]dged and decreed:

1. Defendants are hereby enjoined from enforcing Florida Statute §8.01 (1965).

2. Candidates for the office of congressman for each of the districts provided by this order shall be nominated in 1968, as provided by law, and a congressman shall be elected from each district at the general election to be held in 1968.

3. The State of Florida is hereby divided into twelve congressional districts, designated by the following numbers and areas:

(1) The first congressional district is constituted by and composed of the counties of Escambia, Santa Rosa, Okaloosa, Walton, Holmes, Jackson, Washington, Bay and Gulf.

(2) The second congressional district is constituted by and composed of the counties of Liberty, Clay, Gadsden, Leon,

Franklin, Wakulla, Jefferson, Madison, Taylor, Hamilton, Calhoun, Suwanee, Lafayette, Dixie, Columbia, Gilchrist, Levy, Alachua, Bradford, Union, Baker, Putnam and Nassau.

(3) The third congressional district is constituted by and composed of the county of Duval less the following numbered precincts as the same existed on January 1, 1966: Precincts No. 36-A, 36, 31, 31-A, 31-B, 34-A, 35, 30, 30-A, 29-E, 29-J, 29-K, 28-C, 28-I, 29-H, 29-G.

(4) The fourth congressional district is constituted by and composed of the counties of St. Johns, Flagler, Citrus, Hernando, Sumter, Marion, Lake, Volusia, and Seminole; that part of Duval County excluded from the third congressional district in subsection (3); and the following numbered precincts in Brevard County as the same existed on January 1, 1966: Precincts No. 1, 14, 16, 24, and 36.

(5) The fifth congressional district is constituted by and composed of the counties of Orange, Indian River, Osceola, and all of Brevard County except that part enumerated by precincts in subsection (4).

(6) The sixth congressional district is constituted by and composed of the county of Hillsborough and the following numbered precincts in Polk County as the same existed on January 1, 1966: Precincts No. 4, 5, 8, 9, 17, 54, 55, 56, and 57.

(7) The seventh congressional district is constituted by and composed of the counties of Lee, Charlotte, DeSoto, Hardee, Sarasota, Manatee, and all of Polk County except that part enumerated by precincts in subsection (6).

(8) The eighth congressional district is constituted by and composed of the counties of Pinellas and Pasco.

(9) The ninth congressional district is constituted by and composed of the counties of Collier, Palm Beach, Hendry, Martin, St. Lucie, Highlands, Okeechobee, Glades, and the following numbered precincts in Broward County as the same existed on January 1, 1966: Precincts No. 1, 1-A, 1-B, 2, 2-A, 2-B, 2-C, 3, 4, 4-A, 4-B, 4-C, 4-D, 4-E 5-, 5-A, 6, 6-A, 7, 7-A, 8, 9, 9-A, 10, 11, 11-A, 11-B, 11-C, 11-D, 11-F, 12-A, 12-B, and 12-C.

(10) The tenth congressional district is constituted by and composed of all of Broward County except that part enumerated by precincts in subsection (9); and that part of Dade County included within the following numbered precincts as the same existed on January 1, 1966: Precincts No. 2, 3, 240, 239, 241, 12, 4, 5, 6, 215, 7, 242, 211, 212, 213, 214 8, 315, 9, 246, 247, 216, 10, 243, 15, 245, 249, 250, 251, 17, 18, 19, 20, 21, 22, 23, 248, 44, 217, 253, 29, 28, 27, 254, 26, 25, 24, 255, and 263.

(11) The eleventh congressional district is constituted by and composed of the portion of Dade County lying south of a line described as follows:

Commencing at the point of intersection of the North county line of Dade County with the East line of Section 34, township fifty-one south (T 51 S), range forty-two east (R 42 E); thence Southerly along said section line to NE 175th Street; thence Westerly along NE 175th Street to NE 22nd Avenue; thence Northerly along NE 22nd Avenue to NE 183rd Street; thence Westerly along

NE 183rd Street to NE 19 Avenue; thence Southerly along NE 19th Avenue to NE 176th Street; thence Westerly to the center line of Snake Creek Canal; thence Northwesterly along the center line of Snake Creek Canal to NE 183rd Street; thence Westerly along NE 183rd Street to NE 10th Avenue; thence Southerly along NE 10th Avenue to State Road 826; thence Southeasterly along State Road 826 to NE 14th Avenue; thence South along NE 14th Avenue to NE 149th Street; thence East along NE 149th Street to West Dixie Highway; thence Southwesterly along the West Dixie Highway to NE 140th Street; thence East along NE 140th Street to NE 16th Avenue; thence South along NE 16th Avenue to NE 121st Street; thence West along NE 121st Street to NE 8th Avenue; thence Southerly along NE 8th Avenue to the center line of Biscayne Canal; thence Northwesterly along the center line of the Biscayne Canal to the West Dixie Highway; thence Southwest along West Dixie Highway to NE 119th Street; thence West along NE and NW 119th. Street and Gratigny Drive to Red Road; thence North on Red Road to NW 122nd Street; thence West along NW 122nd Street and the extensions thereof to the West line of Dade County;

and lying north of a line described as follows:

Commencing at the point of intersection of the West county line of Dade County with the Tamiami Trail; thence Easterly along the Tamiami Trail to SW 68th Avenue; thence Northerly to the center line of West Flagler Street, thence Westerly along the center line of West Flagler Street to the center line of the Tamiami Canal; thence Easterly along the center line of the Tamiami Canal to its intersection with NW 20th Street; thence

Easterly along NW 20th Street to NW 12th Avenue; thence Southerly along NW 12th Avenue to the North bank of the Miami River; thence Easterly along the North bank of the Miami River to NW 11th Avenue; thence South along NW 11th Avenue to the center line of West Flagler Street; thence Westerly along the center line of West Flagler Street to SW 13th Avenue; thence Southerly along SW 13th Avenue to SW 8th Street; thence Easterly along SW 8th Street to the city limits of the city of Miami; thence East and Southeasterly to the Atlantic Ocean at Norris Cut.

Said watercourses, streets, avenues, roads and city limits being referred to as the same existed on January 1, 1966.

(12) The twelfth congressional district is constituted by and composed of all of Monroe County and those precincts in Dade County lying south of the southern boundary line of the eleventh congressional district described in subsection (11).

DONE and ORDERED this 2nd day of August, 1967, at Miami, Florida.

DAVID DYER
United States Circuit Judge

EMETT C. CHOATE
Senior United States District Judge

WILLIAM A. McRAE, JR.
United States District Judge

App. 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 64-143-CIV-EC

EDMUND G. GONG, et al.,
Plaintiffs,

vs.

CLAUDE R. KIRK, as Governor of the State of Florida, et al.,
Defendants.

OPINION

On March 3, 1964, plaintiffs, each a citizen of the United States and of Florida, and each a qualified voter in the county of his residence and in the congressional district in which he resides, brought an action against the Governor, the Secretary of State, the members of the Boards of County Commissioners of Dade and Broward counties, and the members of the Board of State Canvassers of the State of Florida. The plaintiffs seek a declaration that Fla. Stat. §8.01 is unconstitutional, an injunction against the enforcement of that statute, and further equitable relief. Plaintiffs allege that the division of the State of Florida into twelve congressional districts made by Fla. Stat. §8.01 was not determined on the basis of equal population of these districts, and is in violation of Article I and the fourteenth amendment of the United States Constitution.

On May 11, 1964, plaintiff's request for a preliminary injunction was denied, and further decision was reserved until after the 1965 session of the Florida Legislature. That Legislature enacted Ch. 65-2441, Fla. Laws of 1965, which amended Fla. Stat. §§8.01 and 8.04. On March 1, 1966, the court found

that the 1965 act met the constitutional standard of *Wesberry v. Sanders*, 376 U.S. 1(1964), "on a temporary basis."[1]

An appeal to the United States Court of Appeals for the Fifth Circuit from the March 1, 1966, order resulted in a ruling that the district judge and the appellate court were without jurisdiction, since a three-judge court was required under 28 U.S.C. §2281. *Gong v. Kirk*, 375 F.2d 728 (5th Cir. 1967).

Pursuant to the mandate of the Fifth Circuit a three-judge district court was convened. A pre-trial hearing was held on June 30, 1967. At the hearing the parties submitted all issues and evidentiary matters and stipulated that no testimony need be taken and that no further hearing need be held.[2]

Florida's total 1960 population according to the official decennial federal census is 4,951,560. The use of the federal de-

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[1]The order provided that the court "retains jurisdiction of this case until 60 days after the next [1967] session of the Florida Legislature so as to then further determine whether the Legislature has redistricted the State of Florida into congressional districts meeting the standard established by *Wesberry v. Sanders*, in light of the then situation." A further order, dated March 7, 1966, directed the Attorney General of the State of Florida to suggest to the Governor "that it is important that he consider expanding his call for a Special Session of the Legislature so that the Legislature might consider any further changes in Congressional reapportionment that would bring a closer approximation of equality in the districts than now exists under the present law, keeping in mind that it is the duty of the Governor and the Legislature to comply with the law governing reapportionment as closely as possible."

In fine, various sessions of the Florida Legislature have been given opportunities to fulfill their constitutional duty to provide for proper congressional representation for this state. They have failed to do so.

[2]The court has stated that in the event the 1967 Legislature, then in regular session, acted on the redistricting matter, the cause would be reopened for further presentations. The Legislature has now adjourned its regular session without passing a redistricting bill.

cennial census is provided as a basis for constitutional apportionments by Section 5, Article VII, of the Florida Constitution. The federal decennial census meets the minimal requirements of the equal protection clause, and no other census or population computation has been shown to be accurate. *Swann v. Adams*, Cause No. 62-186-CIV-DD, U.S. Dist. Ct., So. Dist. of Fla., Findings of Fact and Conclusions of Law, Feb. 13, 1967; *Reynolds v. Sims*, 377 U.S. 533 (1964).

As a result of the 1960 decennial census, and in accordance with 2 U.S.C. §2a, Florida is entitled to twelve members of the House of Representatives. Dividing Florida into twelve congressional districts, each should ideally consist of 412,630 persons.

The present twelve congressional districts are established by Fla. Stat. §8.01, Ch. 65-2441, Laws of Florida, 1965. The district with the largest population contains 465,160 (+12.73%); the district with the smallest population contains 374,665 (−9.21%). The maximum total variance is 21.94%. The present congressional districts are unconstitutional as in violation of Article I, section 2 of the Constitution of the United States, and the equal protection clause of the fourteenth amendment. *Duddleston v. Grills*, 385 U.S. 455 (1967), *vacating*, *Grills v. Branigin*, 255 F.Supp. 155 (S.D. Ind. 1966); *Swann v. Adams*, 385 U.S. 440 (1967); *Reynolds v. Sims*, 377 U.S. 533 (1964), *Wesberry v. Sanders*, 376 U.S. 1 (1964); *cf.*, the order of March 1, 1966, entered in the instant cause.

The court has considered the redistricting plans proposed by the parties and by Dr. Manning J. Dauer,[3] amicus curiae, to-

[3]Professor of Political Science, University of Florida.

gether with the maps, population charts, and briefs in support of the plans. One plan offered by plaintiffs calls for six at-large districts and six area districts. The court has previously considered requiring congressional elections to be held at-large. See Order of May 13, 1964, filed in this cause. At-large elections, though clearly meeting the one-man one-vote mandate, are not in the best interest of the citizens of this state. The cost of campaigning state-wide every two years for a congressional office would be prohibitive for many qualified candidates. At-large representation is also objectionable in that it would remove congressmen from that more immediate contact with their constituents which has been traditional in district representation. This plan is therefore rejected.

The other four proposals[4] are rejected in favor of a plan largely based on House Bill 3088.[5] In the plan adopted by the court, the district with the largest population contains 415,704 persons (+.74%); the district with the smallest population contains 407,677 persons (—1.20%). The total maximum deviation from mathematical equality is 1.94%.

Since federal census figures are not available by presently established precincts, a calculation of the population of each relevant voting precinct was made by determining the ratio, based on the most recent voter registration figures, of the registered voters in each voting precinct to the total registered voters of the particular county and applying that ratio to the

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[4]The total maximum deviation in these proposals are as follows:

Plaintiffs' Exhibit A - 2.98%
Defendants' House Bill 3088 - 2.81%
Defendants' Senate Bill 1652 - 8%
Dr. Dauer's Plan - 2.33%

[5]House Bill 3088 was introduced, but failed to pass, in the 1967 Legislature.

county population as shown by the 1960 decennial census: *i.e.*, county registration is to county population as precinct registration is to precinct population. This formula was suggested by both plantiffs and defendants.[6]

The congressional districting for the State of Florida, shall contain twelve districts as follows:

DISTRICT	POPULATION	% DEVIATION FROM EQUALITY
1	415,496	+ .69
2	407,677	−1.20
3	411,683	− .23
4	409,716	− .71
5	409,532	− .75
6	415,704	+ .74
7	414,474	+ .44
8	411,450	− .29
9	409,952	− .64
10	414,998	+ .57
11	414,759	+ .51
12	414,691	+ .49
Smallest—		−1.20% (2nd Dist.)
Largest—		+ .74% (6th Dist.)
Total Maximum Deviation—		1.94%

[6]In his scholarly brief Dr. Dauer urged the use of federal census enumeration districts. These are small areas each with a population of close to 1,000 inhabitants, for which census data are tabulated.

Dr. Dauer claims that these enumeration districts are accurate, and that by using them as building blocks it would be possible to arrive at districts with a deviation from largest to smallest district of two per cent. Maps of each county, showing the number of inhabitants in and the geographic boundaries of each enumeration district are the working papers for figures published by the United States Bureau of Census. These working papers are not published generally but photostats are sold by the Bureau, and a set is available at the College of Business Administration, University of Florida. However, the data is not available in county records, and it is not feasible for the court to seek out, correlate and digest the voluminous documents and data. Furthermore, as previously noted, the plan adopted by the court contains a total maximum deviation of less than two per cent.

The areas of these twelve districts are as set forth in the final order entered this day.

Dated this 2nd day of August, 1967.

DAVID DYER
United States Circuit Judge

EMETT C. CHOATE
Senior United States District Judge

WILLIAM A. McRAE, JR.
United States District Judge

APPENDIX A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EDMOND J. GONG, et al.,
Plaintiffs,
v.
CLAUDE R. KIRK, as Governor of the State of Florida, et al.,
Defendants.
NO. 64-143-CIV-EC

ORDER

The undersigned judges have carefully studied the "Suggestion for Reconsideration of Judgment and Final Order and Motion to Stay Proceedings" heretofore filed herein by the Attorney General of the State of Florida. The Honorable Emett C. Choate, Senior District Judge, is out of the United States and accordingly is not available to act.

Upon consideration, it is

ORDERED AND ADJUDGED that the judgment and final order entered August 2, 1967, is hereby reaffirmed, and the motion to stay is hereby denied.

DONE AND ORDERED this 27th day of September, 1967.

DAVID W. DYER
United States Circuit Judge

WILLIAM A. McRAE, JR.
United States District Judge

Copies to counsel

APPENDIX A-3

IN THE

United States Court of Appeals

No. 23640

EDMOND J. GONG, ET AL.,
Appellants,

v.

CLAUDE R. KIRK, as Governor of the State of Florida, ET AL,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FROM THE SOUTHERN DISTRICT OF FLORIDA

(March 27, 1967.)

Before PHILLIPS,* THORNBERRY and DYER, Circuit Judges.

PER CURIAM: Appellants, by this litigation, bring into issue the constitutional validity of Florida's Congressional apportionment plan, Ch. 65-2441, Fla. Laws of 1965, Section 8.01, Florida Statutes, and seek to enjoin the implementation thereof. Appellants urged below that a three-judge court be convened to consider the matter pursuant to 28 U.S.C. § 2281.[1] The

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*Of the Tenth Circuit, sitting by designation.

[1] 28 U.S.C. § 2281 reads as follows:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any

district court declined to convene a thret-judge court and proceeded to hear the matter as a single judge. The district court then held the Florida apportionment statute constitutional on a "temporary basis," but urged the Florida legislature to reexamine the plan its next session. From the district court's order, this appeal is taken.

After a careful review of the case law in this area, we conclude that the district court erred in holding that a three-judge court was not required, and that he was therefore without jurisdiction as consider the matter as a single judge.[2] We, therefore, are likewise without jurisdiction to consider the merits of this case and are compelled to dismiss the appeal.[3] The

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officer of such State in the enforcement or execution of such statute or of an order made by an administration board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

[2]The action of the district court based, no doubt, upon *Bailey v. Patterson*, 1962, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512, wherein the Supreme Court stated that "three judges are . . . not required when, as here, prior decisions make frivolous any claim that a state statute *on its face* is not unconstitutional." *Id* at 33, 82 S.Ct. at 551, 7 L.Ed.2d at ..... (Emphasis added.) Both *Bailey* and *Turner v. City of Memphis*, 1962, 369 U.S. 350, 82 S.Ct. 805, 7 L. Ed.2d 762, the only other Supreme Court case in which the *Bailey* doctrine has been applied, involved attacks upon state statutes or regulations requiring segregation of facilities of public accommodation. In both cases the legislation involved revealed its unconstitutionality on its face. Clearly, at the time the district court had this matter before it the Florida Apportionment Plan of 1965 could not have been considered unconstitutional on its face. The *Bailey* rationale, we feel, was not meant to be applied where the alleged unconstitutionality can only be determined following an extensive examination of the facts involved. (As in the case of the review of a state apportionment plan.)

[3]See *Stratton v. St. Louis S.W. Ry*, 1930, 282 U.S. 10, 51 S.Ct. 8, 73 L.Ed. 135. See also Wright, Federal Courts § 50 at 166-67.

Supreme Court has held, however, that the Courts of Appeals are not without power to give guidance "where a single judge has erroneously invaded the province of a three-judge court."[4] We therefore direct that, upon a renewed motion by petitioner, a three-judge district court be expeditiously convened. All due speed is required in this matter so that the questions involved may be resolved well in advance of next year's congressional elections.

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[4] *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 1962, 370 U.S. 713, 716, 82 S.Ct. 1294, 1296, 8 L.Ed.2d 794, ...

APPENDIX A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EDMOND J. GONG, ET AL, Plaintiffs, vs. HAYDON BURNS, as Governor of the State of Florida, et al., Defendants	NO. 64-143-CIV-EC

ORDER

The Petition of the Plaintiffs with respect to the constitutionality of Chapter 65-2441, Florida Laws, Extra Session, 1965 (S.B. 26-XX) which accomplishes the congressional redistricting of Florida came on for hearing before this Court and the Court being fully advised in the premises, it is hereby

ORDERED and DECREED:

1. Although the constitutionality of Chapter 65-2441, Florida Laws, in the light of the Supreme Court's opinion in *Wesberry v. Sanders*, 376 U.S. 1 (1964) is a very close question, this Court finds Chapter 65-2441, Florida Laws, meets the constitutional standard of *Wesberry v. Sanders* on a temporary basis.

2. If the Florida Legislature can improve the congressional districting of Florida in the light of *Wesberry v. Sanders* at its next session is is hoped it will do so.

3. Manifestly the congressional districts established by Chapter 65-2441, Florida Laws, are not weighted exactly in accord-

ance with mathematical perfection, but the Court takes notice that due to the fact of the ebb and flow of the population in Florida, it is doubtful that an exactly even balance will ever be achieved or will ever be approached within a small percentage.

4. This Court retains jurisdiction of this case until 60 days after the next session of the Florida Legislature so as to then further determine whether the Legislature has redistricted the State of Florida into congressional districts meeting the standard established by *Wesberry v. Sanders*, in light of the then situation.

DONE and ORDERED at Miami, Dade County, Florida this 1st day of March, 1966.

EMETT C. CHOATE
United States District Judge

APPENDIX B-1

Ch. 65-2441

An act relating to establishment of congressional districts; amending section 8.01, Florida Statutes, providing for the division of the state into congressional districts; amending section 8.04, Florida Statutes, providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 8.01, Florida Statutes, is amended to read:

Section 8.01 *Division of State into Congressional Districts.* —The state shall be and the same is hereby divided into twelve (12) congressional districts, the same to be serially numbered, to be designated by such numbers, and to have the areas as follows, to-wit:

(1) The first congressional district shall be constituted by and composed of the counties of Escambia, Santa Rosa, Okaloosa, Walton, Holmes, Washington, Bay and Gulf.

(2) The second congressional district shall be constituted by and composed of the counties of Jackson, Calhoun, Gadsden, Liberty, Franklin, Leon, Wakulla, Jefferson, Madison, Taylor, Lafayette, Dixie, Hamilton, Suwannee, Gilchrist, Levy, Columbia, Baker, Union, Bradford, Nassau, Clay, Putnam, and Alachua.

(3) The third congressional district shall be constituted by and composed of the county of Duval.

(4) The fourth congressional district shall be constituted by and composed of the counties of St. Johns, Flagler, Pasco, Os-

ceola, Citrus, Hernando, Sumter, Marion, Lake, Volusia and Seminole.

(5) The fifth congressional district shall be constituted by and composed of the counties of Orange and Brevard.

(6) The sixth congressional district shall be constituted by and composed of the county of Hillsborough.

(7) The seventh congressional district shall be constituted by and composed of the counties of Polk, Highlands, Hardee, DeSoto, Manatee, and Sarasota.

(8) The eighth congressional district shall be constituted by and composed of the county of Pinellas.

(9) The ninth congressional district shall be constituted by and composed of the counties of Okeechobee, St. Lucie, Martin, Palm Beach, Hendry, Collier, Lee, Indian River, Glades and Charlotte.

(10) The tenth congressional district shall be composed of Broward County and that part of Dade County north of the northern boundary of the eleventh congressional district described in subsection (11). (It being the specific legislative intent to include within said district ten (10) all of Broward County and the lands contained in Dade County voting precincts numbered 2, 3, 4, 5, 6, 7, 8, 211, 212, 213, 214, 215, 216, 239, 240, 241, 242, 247, and 315 as same appear on the official map of voting precincts in and for Dade County, Florida, adopted and approved by the board of county commissioners of Dade County on May 18, 1965 and recorded in Plat Book 79, page 56, public records of Dade County, Florida.)

(11) The eleventh congressional district shall be constituted by and composed of the north portion of Dade County lying south of a line described as follows:

Commencing at the point of intersection of the North county line of Dade County with the East line of Section 34, township fifty-one south (T 51 S), range forty-two east (R 42 E); thence Southerly along said section line to the center line of NE 175th Street; thence Westerly along the center line of NE 175th Street to the center line of NE 22nd Avenue; thence Northerly along the center line of NE 22nd Avenue to the center line of NE 183rd Street; thence Westerly along the center line of NE 183rd Street to the center line of U.S. Highway I-95; thence Southwesterly along the center line of U.S. Highway I-95 to the center line of Golden Glades Drive; thence Westerly along the center line of Golden Glades Drive to the center line of NW 27th Avenue; thence Southerly along the center lne of NW 27th Avenue to the center line of NW 151st Street; thence Westerly along the center line of NW 151st Street to the center line of E 4th Avenue; thence Southerly along the center line of E 4th Avenue to the center line of Gratigny Drive; thence Westerly along the center line of Gratigny Drive to the center line of W 2nd Avenue; thence Northerly along the center line of W 2nd Avenue to the center line of N W135th Street (W 81st Street); thence Westerly along the center line of NW 135th Street to NW 57th Avenue (Red Road); thence Northerly along the center line of NW 57th Avenue to the point of intersection with the North County line of Dade County; and lying north of a line described as follows:

Commencing at the point of intersection of the West County line of Dade county with the center line of the

Tamiami Canal; thence Easterly along the center line of the Tamiami Canal to its intersection with the center line of NW 20th Street; thence Easterly along the center line of NW 20th Street to the center line of NW 12th Avenue; thence Southerly along the center line of NW 12th Avenue to the North bank of the Miami River; thence Easterly along the North bank of the Miami River to the center line of NW and NE 2nd Street; thence Easterly along the center line of NW and NE 2nd Street and an extension thereof to the East city limits of the City of Miami; thence North along the East city limits of the City of Miami to the center line of an extension of 14th Street, Miami Beach; thence Easterly along the center line of said extension of 14th Street to the center line of Dade Boulevard; thence Northeasterly along the center line of Dade Boulevard to the center line of Alton Road; thence Northerly along the center line of Alton Road to the South line of the 36th Street Causeway; thence Easterly along the South line of the 36th Street Causeway and an extension of said line to Biscayne Waterway; thence along the center of Biscayne Waterway to the center line of 34th Street, Miami Beach; thence easterly along the center line of 34th Street to the Atlantic Ocean;

Said watercourses, streets, avenues, roads and city limits being referred to as the same existed and were recorded the 19th day of May, A.D. 1965 in Book 79 of Plats, at page 56 of the Public Records of Dade County, Florida.

(12) The twelfth congressional district shall be constituted by and composed of Monroe County and that part of Dade County South of the Southern boundary of the eleventh congressional district described in subsection (11).

Section 2. Section 8.04, Florida Statutes, is amended to read:

Section 8.04 *Effective Dates.*—Candidates for the office of congressman for each of the districts provided in Section 8.01 shall be nominated in 1966, as provided by law, and a congressman shall be elected from each such district at the general election to be held in 1966. For all other purposes, Section 8.01 shall take effect at the expiration of the term of office of the congressmen now serving from the state.

Approved by the Governor July 7, 1965.

Filed in Office Secretary of State July 7, 1965.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 872

CLAUDE R. KIRK, JR., as Governor of the State of Florida, et al.,

Appellants,

v.

EDMOND J. GONG, et al.,

Appellees.

Appeal from the United States District Court for the Southern District of Florida

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MOTION TO AFFIRM

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Appellees move to affirm, pursuant to Rule 16(c), the judgment sought to be reviewed in this appeal on the ground that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

STATEMENT

Appellees Gong, Baker, Kruse and Griffin[1] commenced this action in March, 1964 to challenge the constitutionality of the Congressional districting law of Florida. Appellees' motion to convene a three-judge court was denied. There were then two decisions of the single-judge District Court adverse to Appellees on the merits. The appeal from the second of these decisions was dismissed on jurisdictional grounds by the United States Court of Appeals for the Fifth Circuit but with leave to Appellees to renew their request for a three-judge court. Such a District Court was duly convened, found the Florida Congressional districting law unconstitutional, and ordered the implementation of a new districting plan with a maximum deviation from smallest to largest district of only 1.94%.

Appellees submit that all parties to this cause stipulated in the District Court that the only proper basis on which to create a constitutional Congressional districting plan for the State of Florida was the 1960 decennial census; that the District Court utilized this basis with essential reliance on a plan submitted by Appellants, but significantly improved this plan; that the plan as so developed is a rational plan meeting all constitutional tests; that the factoring of counties under the plan was done in accordance with the parties' stipulation as to the *only* proper basis of factoring; and that Appellants are now precluded from challenging the accepted plan which was essentially their plan. Appellees, therefore, submit that the decision of the District Court should be affirmed without further argument.

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[1]The members of The Board of County Commissioners of Dade County, Florida, who were defendants below, are also Appellees.

The Final Order of the District Court redistricts the twelve Congressional districts in the State of Florida. This districting is done on the basis of the 1960 decennial census, which has repeatedly been held by this Court to be the appropriate basis. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Maryland Citizens Committee for Fair Congressional Districting, Inc. v. Tawes*, 253 F. Supp. 731 (D. Md. 1966), aff'd *sub nom*, *Alton v. Tawes*, 384 U.S. 315 (1966); *Lucas v. Rhodes*, 36 U.S.L.W. 3225 (1967). Appellants refer in their Jurisdictional Statement to cases indicating that use of any interim census figures is improper. These cases are inapposite, since the only census used by the District Court was the 1960 decennial census.

The basic plan used by the District Court in developing its plan was originally submitted to the District Court by *Appellants* as a "fair and constitutional Congressional redistricting." The plan submitted by Appellants contained a total percentage deviation from the smallest to the largest district of 2.81%, with the smallest district being 1.25% under the mathematically perfect constituency and the largest district being 1.56% in excess of the mathematically perfect constituency. The District Court, modifying that plan by transferring peripheral precincts, reduced this maximum variation to 1.94%, ranging from 1.20% under the mathematically perfect constituency to .74% in excess thereof. *The plan adopted by the District Court contained smaller variations than those in any plan submitted by any party.*

Creation of twelve equal Congressional districts without division of counties was not possible. Thus Dade County with one-fifth of Florida's 1960 population had to be

divided; the challenged legislative plan[2] had previously divided Dade County into three parts. Since counties required division, the District Court divided them into voting precincts—the only feasible electoral unit smaller than a county. Since federal census figures were not available by voting precinct, a calculation of the population of each relevant voting precinct was made by determining the ratio of the registered voters in each such voting precinct to the total registered voters in the particular county and applying that ratio to the county population as shown by the 1960 decennial census.

All parties before the Court, including the Appellants, agreed that this method of factoring the population of individual counties selected by the Court was in fact the proper method.[3] As the District Court stated in its Opinion:

> "Since federal census figures are not available by presently established precincts, a calculation of the population of each relevant voting precinct was made by determining the ratio, based on the most recent voter registration figures, of the registered voters in each voting precinct to the total registered voters of the particular county and applying that ratio to the county population as shown by the 1960 decennial census: *i.e.*, county registration is to county population as precinct registration is to precinct population. *This formula was suggested by both plaintiffs and defendants.*" (emphasis added)

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[2]Fla. Stats., Sec. 8.01, Chap. 65-2441, Fla. Laws (1965).

[3]The Florida Legislature had also previously accepted this method of factoring population. Fla. Stats., Sec. 8.01, Chap. 65-2441, Fla. Laws (1965).

After the District Court entered its Opinion and Final Order, Appellants, at the request of Congressmen disappointed by the re-alignment of their particular districts,[4] filed a Suggestion for Reconsideration contending that additional Bureau of Census estimates existed (set out in an informal letter from the Bureau) which indicated that the plan adopted by the District Court might contain a maximum population variance of 11.83% rather than the 1.94% which the District Court had found the plan contained. The source of this conclusion by the Bureau of Census is undisclosed. The location of the material on which the conclusion is based is likewise undisclosed. The District Court determined in its Opinion:

> "In his scholarly brief Dr. Dauer [Professor of Political Science, University of Florida] urged the use of federal census enumeration districts. These are small areas each with a population of close to 1,000 inhabitants, for which census data are tabulated. Dr. Dauer claims that these enumeration districts are accurate, and that by using them as building blocks it would be possible to arrive at districts with a deviation from largest to smallest district of two per cent. Maps of each county, showing the number of inhabitants in and the geographic boundaries of each enumeration district are the working papers for figures published by the United States Bureau of Census. These working papers are not published generally

[4]Appellants, after reviewing the proposed order of the District Court, suggested the realignment of the Dade Congressional districts to the pattern desired by a particular congressman. Even in this proposal Appellants followed the method of factoring counties adopted by the District Court. It was only when more than one congressman complained that Appellants suggested a new method of factoring.

> but photostats are sold by the Bureau, and a set is available at the College of Business Administration, University of Florida. However, the data is not available in county records, and it is not feasible for the court to seek out, correlate and digest the voluminous documents and data. Furthermore, as previously noted, the plan adopted by the court contains a total maximum deviation of less than two per cent."

Appellees have never taken any exception whatsoever to these observations or conclusions of the District Court.

The use of registered voter figures for certain purposes in reapportionment plans has been approved by the Supreme Court. *Burns v. Richardson*, 384 U.S. 73 (1966). The only caveat established by the Court in *Burns* was that "the distribution of registered voters approximates distribution of state citizens or another permissible population base." 384 U.S. at 94. Even accepting as true the Bureau of Census figures suggested by Appellants, these figures do not show violation of this standard. Of course, the District Court in the instant case did not use the number of registered voters in place of actual population figures as a method of districting, as was done in the fact situation involved in *Burns*. Instead, the District Court merely used the registered voter statistics as a method of deriving precinct population figures. This method of factoring was not only *a* rational basis but was in fact the basis suggested to the District Court by both Appellants and Appellees as the *only* rational basis.

CONCLUSION

Appellees commenced this action in 1964. Two District Court decisions, one United States Court of Appeals decision, and numerous legislative efforts later; a third District Court decision has given the citizens of Florida substantial equality of Congressional districts. Appellees submit that the District Court's improvement on Appellants' own plan should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

KIRK, GOVERNOR OF FLORIDA, ET AL. *v.*
GONG ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 872. Decided January 15, 1968.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.